THE

ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING FEBRUARY 14TH, 1903.)

VOL. II. TORONTO, FEBRUARY 19, 1903. No. 6.

STREET, J. JANUARY 26TH, 1903.

TRIAL.

BLACK v. IMPERIAL BOOK CO.

Copyright—Foreign Reprints—Notice to Commissioners of Customs.

The judgment delivered 21st November, 1902, 1 O. W. R. 743, was recalled; and judgment was now given holding that sec. 152 of the Imperial Customs Law Consolidation Act, 1876, mentioned in the former report, is not in force in this Province, notwithstanding the expression of opinion of the Commissioners in part iv. of the appendix to volume 3 of the Revised Statutes of Ontario, 1897, to the effect that that section is in force; and that the plaintiffs had established their right to an injunction perpetually restraining the defendants the Imperial Book Company from importing into Canada any copies of the 9th edition of the Encyclopædia Britannica, and for delivery up, and for an account.

Held, also, that the production of a certified copy of the entry in the book of Registry at Stationers' Hall is all that is necessary to make out a prima facie proprietorship in the copyright of an Encyclopædia, under secs. 18 and 19 of the Imperial Copyright Act, 1842, and it is not necessary, for such prima facie case, to prove by direct evidence other than the copy of the entry, the facts which by secs. 18 and 19 are made conditions precedent to the vesting of the copyright in one who is in not the author.

W. Barwick, K.C., and J. H. Moss, for the plaintiffs.

S. H. Blake, K.C., and W. E. Raney, for the defendants the Imperial Book Company.

A. Mills, for the defendant Hales.

BRITTON, J. FEBRUARY 9TH, 1903.

CHAMBERS.

SMELLIE v. WATSON.

Appeal—Master's Report—Time Expired—Leave to Appeal—Rule 353—Terms—Costs.

Motion by defendant for leave to serve notice of motion by way of appeal from the report of the local Master at Guelph, dated 7th January, 1903, filed 12th January, 1903.

D. O. Cameron, for defendant.

W. H. Kingston, K.C., for plaintiff.

BRITTON, J.—Rule 353 should receive a liberal construction, and the application should be granted. Upon the defendant paying into Court the sum of $150 to the credit of this cause, as security to the plaintiff in the event of plaintiff's ultimate success, and upon payment by the defendant of the costs of this application, the order may go for leave to serve notice of appeal. The money to be paid into Court, and the costs of this application to be paid, and notice to be served, on or before the 16th February, 1903. The plaintiff's costs of moving to confirm report already incurred, except so far as covered by the costs of the 3rd inst., already paid, to be costs in the cause to the plaintiff, in any event. If the defendant abandons, or does not proceed with his appeal, the costs of this motion to be costs in the cause to plaintiff.

BRITTON, J. FEBRUARY 9TH, 1903.

CHAMBERS.

McKELVEY v. CHILMAN.

Costs—Scale of—Action for Trespass to Land—Value of Land—Payment of $1 into Court—Acceptance by Plaintiff.

Motion by defendant to set aside taxation of plaintiff's costs and to direct taxation on Division Court scale and set-off under Rule 1132. The action was brought in the High Court for trespass to land. The land, as shewn by affidavit, was of value exceeding $200. The plaintiff claimed $1,000 damages. The defendant paid $1 into Court and the plaintiff accepted it. No question as to the title to the land was raised by defendant.

J. L. Counsell, Hamilton, for defendant.

J. Dickson, Hamilton, for plaintiff.

BRITTON, J.—The action was properly brought in the High Court. The plaintiff's right to costs is simply because under Rule 425 he is in such a case offered his costs as an inducement to this termination of the litigation. Babcock v. Standish, 19 P. R. 195, followed. Chick v. Toronto Electric Light Co., 12 P. R. 58, and Tobin v. McGillis, 12 P. R. 60, referred to as difficult to distinguish and not cited in the case followed. Motion dismissed with costs.

BRITTON, J. FEBRUARY 9TH, 1903.

CHAMBERS.

LOVELL v. PHILLIPS.

Costs—Scale of—Jurisdiction of County Court—Ascertainment of Amount—Action for Price of Goods—Reduction of Claim by Trial Judge.

Appeal by plaintiff from taxation of costs by the senior taxing officer at Toronto. The action was brought in the High Court to recover $340, balance of an account for $790 for logs sold by plaintiff to defendant; $450 was paid by defendant before action. The trial Judge found that the sale was made as contended by plaintiff, but reduced the amount by $20, by reason of some of the logs not having been received by defendant. Upon this judgment, with no certificate, the taxing officer taxed to plaintiff costs on the lower scale only and to defendant the excess of his costs over County Court costs, and set them off pro tanto.

S. B. Woods, for plaintiff, conceded that, if the finding had been for $340, he would have been entitled only to costs on the County Court scale, but contended that, as the trial Judge reduced the amount, no matter why, the finding was for an amount not liquidated or ascertained by the signature of defendant or by act of the parties.

H. D. Gamble, for defendant, contra.

BRITTON, J., held that plaintiff's contention could not prevail. Furnivall v. Saunders, 26 U. C. R. 119; Ostrom v. Benjamin, 21 A. R. 467, and Brown v. Hose, 14 P. R. 3, discussed. Appeal dismissed without costs.

MEREDITH, C.J. FEBRUARY 9TH, 1903.

CHAMBERS.

EVOY v. STAR PRINTING AND PUBLISHING CO.

Security for Costs — Libel—Newspaper—Mistake—Apology—Good Defence—Grounds of Action Trivial or Frivolous.

Appeal by plaintiff from order of Master in Chambers (ante 91) requiring plaintiff to furnish security for defend-

ants' costs of an action for libel. The writing complained of was published in defendants' newspaper.

G. P. Deacon, for plaintiff.

J. B. Holden, for defendants.

MEREDITH, C.J., dismissed the appeal, holding that a case for security for costs had been established.

BRITTON, J. FEBRUARY 9TH, 1903.

WEEKLY COURT.

WRIGHT v. ROWAN.

Injunction—Interim Injunction—Dealing with Shares—Dissolving Injunction on Facts Appearing on Motion to Continue.

Motion by plaintiffs, the executors of J. D. Wright, to continue injunction obtained by plaintiffs ex parte, restraining defendant from dealing with certain shares forming part of the estate.

D. Henderson, for plaintiffs.

C. H. Ritchie, K.C., for defendant.

BRITTON, J., held that, upon the facts of the case as presented on the present motion, an injunction would not be granted, and so the motion failed. It was not a case where any injury would be likely to result by withholding the injunction. The defendant seemed to have been frank and willing to make full disclosure, and there was nothing in his examination that would suggest a possibility of loss to plaintiffs, if on any ground they were entitled to recover. It was no ground for continuing the injunction that it would do no harm to defendant. It might or might not. There was no such dealing with shares as entitled plaintiff to tie these shares up pending litigation. Motion dismissed and injunction dissolved. Question of costs reserved for trial Judge, or further order.

FEBRUARY 9TH, 1903.

DIVISIONAL COURT.

HAIGHT v. DANGERFIELD.

Will—Construction—Estate for Joint Lives of Devisees—Remainder to Heirs of Both—Period for Ascertainment of Heirs—Mortgage by Joint Tenants for Life.

Appeal by plaintiffs from judgment of LOUNT, J. (1 O. W. R. 551), in an action tried at Hamilton without a jury.

The plaintiffs were the executors of the will of the late Samuel Haight. Among the assets of the estate was a mortgage made by Arthur Eugene Dangerfield and Richard Dangerfield, two sons of the late James Dangerfield, under whose will the two sons took their interest. The mortgage purported to convey certain lands in fee simple to the testator, James Haight, and the defendants alleged that all they took under the will of James Dangerfield was an estate for life. The action was brought by the plaintiffs for the sale of the mortgaged premises, for judgment against the mortgagors on their covenant for payment, for immediate possession, and for a declaration of the construction of the will of James Dangerfield. The trial Judge dismissed the action, except as to the mortgage, upon which he gave judgment for possession, an account, and payment. The plaintiffs appealed, seeking further relief.

J. Bicknell, K.C., and G. C. Thompson, Hamilton, for appellants.

W. H. Barnum, Dutton, for adult defendants.

F. W. Harcourt, for infant defendants.

The judgment of the Court (BOYD, C., FALCONBRIDGE, C.J.) was delivered by

BOYD, C.—By the terms of the will a point of time was fixed for the sale of the land and distribution of the proceeds of sale. That is, at the time when the life estate given to the two sons—to last as provided by the testator during the life of the longest lived of the two—has come to an end by the death of both sons. At that time the corpus of the land is to be sold and the proceeds of each share (i.e., presumably, a moiety) shall be equally divided and given unto their respective lawful heirs then surviving them, share and share alike. This plainly points to the ascertainment of the persons to share beneficially in the moneys arising from the sale at a time fixed as at (i.e., after) the decease of both the sons. The persons found to be the lawful heirs of each son are entitled to one-half the proceeds to be divided among them share and share alike. This has the effect of limiting the sons' estate to one for life or their joint lives, and to something less than an estate in fee or in tail. The nature of the estate under the mortgage will depend on the state of affairs as to family at the death of the son who first dies. But upon the death of both sons the corpus falls to be sold and divided as directed. Having regard to Evans v. Evans, [1892] 2 Ch. 173, the estate in the land is to be defined as a life estate for the joint lives of the two sons, the first takers

(subject to certain modifications that may arise on the death of one during the life of the survivor, which can now only be conjectural) with remainder in fee to the persons answering the description of the heirs of each son at the death of the longest lived. The ultimate destination of the proceeds of the land is not to those who are the heirs of the first deceased son at the time of his death, but those who are his heirs at the death of the son who dies second.

Judgment accordingly. All costs of plaintiffs to be paid by the defendants the mortgagors up to the hearing, and costs of those who are brought in on account of the question of construction to be borne either by themselves or by the mortgagors, as they covenanted for a title in fee simple. Costs in Master's office reserved to be disposed of by the Master on and after taking the accounts.

FEBRUARY 9TH, 1905.

DIVISIONAL COURT.

PEOPLE'S BUILDING AND LOAN ASSN. v. STANLEY.

Mortgage—Building Society—Fraudulent Misrepresentations—Rate of Interest—R. S. O. ch. 127, secs. 4, 5, 6—Jury Notice—Power to Deprive Party of Right to Pay—Judicature Act, sec. 110—Intra Vires.

Appeal by defendant from judgment of LOUNT, J., in favour of plaintiffs for $1,129.66 and interest and costs, in an action to recover payment of the balance due upon two mortgages for $1,000 each. The defendant pleaded that he had been induced to execute the mortgages by fraudulent misrepresentations on the part of plaintiff's manager as to the rate of interest he was to pay. Under the terms of the mortgages defendant agreed to pay the principal with interest at sixteen per cent. per annum, subject to a provision that upon payment of the monthly subscription upon the shares on which he borrowed, and the monthly premiums which he agreed to pay for his shares, together with interest at six per cent. per annum upon the advance, the payments would be accepted in satisfaction of the advance.

W. H. Bartram, London, for appellant.

I. F. Hellmuth, K.C., for plaintiffs.

The judgment of the Court (STREET, J., BRITTON, J.) was delivered by

STREET, J., holding that the trial Judge properly found upon the evidence that the defence of fraud had not been

made out. (2) That the mortgages are not within secs. 4, 5, and 6 of R. S. C. ch. 127, but are framed in the manner authorized by the Building Societies Act. (3) That the Legislature of Ontario had power under sec. 14 of the B. N. A. Act to enact sec. 110 of the Judicature Act, which permits the striking out, in certain cases, of a notice for jury.

Appeal dismissed with costs.

FEBRUARY 9TH, 1903.

DIVISIONAL COURT.

REX v. HAYES.

Criminal Law—Conviction for Importing Alien Labourers into Province — Scienter — Necessity for — Conviction Bad on its Face—Amendment—Evidence as to Alienage—Person Born abroad—British Parents.

Rule nisi to quash conviction of defendant by the police magistrate for the city of Toronto for that the defendant did, at the city of Toronto and at other places, unlawfully prepay the transportation and assist and encourage the importation and immigration of Frederick DeRocher, an alien and foreigner, from the United States of America into Canada, under contract, made previous to the importation, to perform labour and service in Canada, viz., to act as a workman at the factory of the Toronto Carpet Manufacturing Company, Limited, in the city of Toronto, in the employ of the company, contrary to the statute. A fine of $50 and costs was imposed.

G. H. Watson, K.C., for defendant, moved the rule absolute.

J. G. O'Donoghue, for prosecutor, shewed cause.

The judgment of the Court (STREET, J., BRITTON, J.) was delivered by

STREET, J.—The offence of importing aliens under a contract to do work in this Province is a new offence created by 60 & 61 Vict. ch. 11 (D.), as amended by 1 Edw. VII. ch. 13, and it is an essential element in the offence that it shall be done "knowingly," so that, unless done knowingly, it is no offence at all. The information does not charge defendant with having knowingly done the acts charged, nor is he convicted of having knowingly done them; and the conviction on its face is bad: Carpenter v. Mason, 12 A. & E. 629; Regina v. Justices of Radnor, 9 Dowl. P. C. 90. The omission from the information and conviction of one

of the essential elements of the offence is not either an irregularity, an informality, or insufficiency, so as to be aided by sec. 889 of the Criminal Code.

Upon a persual of the depositions, it does not appear that defendant has "knowingly" assisted, encouraged, or solicited the importation of any alien or foreigner into Canada. It appears that Frederick DeRocher was born in the United States, but that his parents were born in Canada. There is no evidence that either he or his parents were ever naturalized in the United States. The presumption from the only facts in evidence is that his parents are British subjects, though residing in the United States, and that, therefore, he is a British subject: Dicey's Conflict of Laws, ed. of 1876, p. 178; 2 Steph. Comm., 12th ed., p. 406.

Rule absolute quashing conviction with costs to be paid by prosecutor. Usual protection to magistrate.

FEBRUARY 9TH, 1903.

DIVISIONAL COURT.

SCOTT v. BARRON.

Way—Dedication as Public Highway—Finding as to on Evidence—Private Way—Removal of Obstruction—Injunction—Mandatory Order—Attorney-General—Adding as Plaintiff—Conditional Consent.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J. (1 O. W. R. 558), dismissing the action and awarding defendants $25 damages under an undertaking as to damages given by plaintiff as a condition to the granting of an application for an interim injunction; and cross-appeal by defendants as to damages. The action was brought by one Scott to restrain defendants from trespassing upon an alleged private way, or, if it were a highway, from continuing an alleged nuisance upon it. The Attorney-General was added as a plaintiff at the trial. The locus was a lane leading to the plaintiff's saw-mill in the 11th concession of the township of Colchester North. The defendants set up that the lane was a public highway and that the proper use thereof was not interfered with by the building of a platform by defendants.

J. H. Rodd, Windsor, for plaintiff.

T. Langton, K.C., for defendants.

The judgment of the Court (STREET, J., BRITTON, J.) was delivered by

STREET, J.—We concur in the finding of the Chief Justice that the lane is not a public highway, and that there has

been no dedication to the public: Bedford v. Hynes, 7 U. C. R. 464; Regina v. Chorley, 12 Q. B. 515; Regina v. Rankin, 16 U. C. R. 304; Dunlop v. Township of York, 16 Gr. 216; Poole v. Huskisson, 11 M. & W. 827. But we are of opinion that the plaintiff Scott, without the assistance of the Attorney-General, is entitled to restrain defendant from erecting the platform in question upon any part of the land set apart for the lane, and to a mandatory order for its removal. If a portion of the lane had become a highway by dedication, the Attorney-General, upon the relation of Scott, would have been entitled to an order for its removal as a nuisance, even although it did not constitute an actual obstruction to the public user: Attorney-General v. Shrewsbury and Kingsland Bridge Co., 21 Ch. D. 752.

The Attorney-General wrote a letter to Scott's solicitors in which he expressed his willingness "that the Attorney-General should be added as a party plaintiff if at the trial the presiding Judge should be of opinion that it was necessary." This was not a fiat nor a consent justifying the addition of the Attorney-General as a plaintiff.

Appeal allowed and plaintiff Scott declared entitled to an injunction to restrain defendants from building or encroaching or in any way trespassing upon the lane, and to a mandatory order directing them within one month to remove the platform and to replace the soil of the lane in its former condition, or in default that plaintiff may do so at the expense of defendants. Reference (if necessary) to local Master at Sandwich to ascertain amount of such expense. Defendants to pay plaintiff's costs to the trial and costs of appeal. Further directions and subsequent costs reserved (in case of a reference) until after report. Cross-appeal to increase defendants' damages dismissed with costs.

FEBRUARY 9TH, 1903.

C.A.

BREWER v. LAKE ERIE AND DETROIT RIVER R. W. CO.

Railway—Injury to Person Crossing Track — Negligence — Question for Jury—Liability of Company—Evidence of Operating Train on Line of other Company—Subsequent Amalgamation—Name of Amalgamated Company—Revivor — Damages for Personal Injuries — Reduction on Appeal.

Appeal by defendants from judgment of FERGUSON, J., in favour of plaintiff in an action to recover damages for injuries alleged to have been sustained by him while driving

a team south from the town of Dresden across defendants' railway, owing to the negligence of defendants. The jury found in favour of plaintiff for $1,800 damages, and judgment was given for that sum.

M. Wilson, K.C., and J. H. Coburn, Walkerville, for appellants.

A. B. Aylesworth, K.C., and J. B. Rankin, K.C., for plaintiff.

The judgment of the Court (Moss, C.J.O.. Osler, Maclennan, Garrow, Maclaren, JJ.A.) was delivered by

Osler, J.A.—Except upon the ground that the damages are excessive, there is no reason to interfere with the verdict and judgment. Whether, at the date of the accident, the Erie and Huron Railway Company and the Lake Erie and Detroit River Railway Company had become amalgamated under the powers conferred by the Dominion Act 62 & 63 Vict. ch. 67, or not, there is some evidence, oral and documentary, that the engine and train which collided with the plaintiff's team were then being operated for and were under the management and direction of the Lake Erie and Detroit River Railway Company—by the servants, in short, of that company—though over the road of the Erie and Huron Railway Company; Fitzgerald v. Grand Trunk R. W. Co., 19 S. C. R. 359. There was quite enough evidence of this to shift the onus upon the defendants of proving that this was not the case and that the train was in fact being operated by and for the Erie and Huron Railway Company. The action is, therefore, seen to have been rightly brought against the Lake Erie and Detroit River Railway Company. The two companies did, in fact, during the pendency of the trial, become amalgamated by agreement, confirmed by 2 Edw. VII. ch. 69 (D.), as a new company, by the name of the company against which the action was brought, and that new company has succeeded to the rights and become subject to all the liabilities of both the amalgamated companies: 62 & 63 Vict. ch. 67, secs. 4-8. The name of the new company being the same as that of the company against which the action was brought, no amendment in the style of cause is necessary, and an order to amend or revive, though in strictness regular, would seem to be superfluous. . . .

The question of negligence was, on the evidence, entirely for the jury. The case could not properly have been withdrawn from them, and, if they believed the evidence for plaintiff, they were quite warranted in finding in his favour everything involved in that question.

The damages awarded, regarding the evidence on that point most favourably for plaintiff, were unreasonably large, even extravagant. Allowing as much as $200 for the horses and waggon—and that, on the evidence, is a high valuation—the jury have given plaintiff $1,600 for a broken or dislocated collar bone, two or three months' illness (not entirely interfering with his working), and the shock and pain of the accident. Beyond a trifling enlargement of the bone at the point of fracture or dislocation, no permanent trace of the accident is left. The plaintiff is a young man, and, on the medical evidence, there is no reasonable ground for supposing that within a year from the time of the accident he will not be as strong and well as he ever was. I think plaintiff should have the option of accepting a judgment for $1,200 with costs throughout, including, of course, the costs of the first trial at which the jury disagreed. If he does so within, say, ten days, the appeal should be dismissed with costs. If he does not, there must a new trial, costs of the former trial to abide the event, and no costs of appeal to either party.

[The plaintiff elected to accept $1,200, and the appeal was dismissed with costs.]

WINCHESTER, MASTER. FEBRUARY 12TH, 1903.

CHAMBERS.

TRADERS BANK OF CANADA v. SLEEMAN.

Discovery—Examination of Parties—Creditors' Action under 13 Eliz. ch. 5—Fraud—Pleading—Prayer for General Relief—Alleged Transfer of Assets of Debtors—Amendment of Pleadings.

Motion by plaintiffs for an order requiring defendants George and Sarah Sleeman to attend for re-examination for discovery and to answer questions which they declined to answer upon examination, and, if necessary, for leave to amend the statement of claim. The action was brought on behalf of the plaintiffs and all other creditors of defendant George Sleeman, against the latter, his wife, his sons, and the firms of Sleeman Brothers, Sleeman & Sons, and George Sleeman's Sons, for: (1) an account of all moneys of or derived from defendant George Sleeman which have been expended for the erection, equipment, and supplying of a new brewery and business in the city of Guelph and discovery in respect thereof; (2) discovery of the assets of defendant George Sleeman at the time he became indebted to plaintiffs and subsequently, and transferred to or placed in the name of defendants, and as to the disposition of such assets; (3)

judgment setting aside a certain deed of lands, and declaring that such lands are the property of defendant George Sleeman, and that defendant Sarah Sleeman is a trustee thereof for him, and making such lands available for payment of the debts of defendant George Sleeman to plaintiffs and other creditors; (4) judgment declaring that defendant Sarah Sleeman is the trustee of or otherwise holds certain other lands for defendant George Sleeman; (5) in the alternative, judgment declaring that all buildings, machinery, equipments, and goods upon the premises used in connection with or forming part of the new brewery and brewing business, are part of the assets of the estate of defendant George Sleeman, and available for payment of his debts; (6) such further and other relief as might seem just. Upon the plaintiffs examining defendants George and Sarah Sleeman, their counsel objected to their answering any questions as to the persons forming the firms of Sleeman & Sons, George Sleeman's Sons, or Sleeman Brothers, and as to whether they had any interest in the brewery business, or whose business it was, or as to defendant George Sleeman's connection therewith, or as to the erection thereof by him, or whether any of his money went into the brewery or the building, and whether the brewery was built, completed, and fitted up with machinery and in operation or not.

W. R. Riddell, K.C., for plaintiffs, contended that the prayer for general relief entitled them to the discovery sought, citing Watson v. Hawkins, 24 W. R. 884; Phillips v. Royal Niagara Hotel Co., 25 Gr. 358; Slater v. Canada Central R. W. Co., ib. 363.

W. M. Douglas, K.C., for defendants.

THE MASTER acceded to the argument of plaintiffs, referring also to Columbia National Bank of Lincoln v. Baldwin, 90 N. W. Rep. 890.

On the question of plaintiffs' right to discovery, the Master referred to Orr v. Draper, 4 Ch. D. 92; Brown v. Wales, L. R. 15 Eq. 142. He held that no question can be raised as to the right of plaintiffs to maintain this action. As defendants admit that plaintiffs are creditors of defendant George Sleeman, and plaintiffs bring the action on behalf of all creditors of that defendant in order to obtain assets which they allege he fraudulently conveyed and transferred in order to defeat, hinder, and delay his creditors, it is not necessary that they should have obtained judgment against their debtor before bringing the action: Reese River Silver Mining Co. v. Attwell, L. R. 7 Eq. 347; Longeway v. Mitchell, 17 Gr. 190 McCall v. Macdonald, 13 S. C. R. 247, 255, Cornish v. Clark,

L. R. 14 Eq. 184, Ramsden v. Brearley, 33 L. T. N. S. 322, and Bank v. Harris, 84 N. Car. 206, also referred to. The plaintiffs are entitled to the fullest discovery of the matters in question. The questions asked should have been answered, whether other questions relating to other matters referred to in the statement of claim should or should not be answered. It is of the utmost importance that the dealings of the parties in connection with the lands described and the buildings, machinery, etc., being erected thereon, should be fully investigated if they are to succeed in proving the allegations contained in the statement of claim. This is not an action for an account, as that term is usually understood, and therefore Graham v. Temperance and General Life Assurance Co., 16 P. R. 536, is not applicable. It is the usual creditors' suit brought under 13 Eliz. ch. 5, and the fullest discovery is always allowed where fraud is charged. The discovery as to the buildings and machinery must necessarily have a bearing on the question as to the ownership of the land upon which they are being erected, and which is attacked by plaintiffs.

Order made as asked for attendance of defendants George and Sarah Sleeman for re-examination. Costs of application to plaintiffs as against these defendants in any event. Order made allowing plaintiffs to amend their statement of claim. Costs of amendment to be costs in the cause.

MEREDITH, C.J. FEBRUARY 13TH, 1903.

CHAMBERS.

REX EX REL. WARR v. WALSH.

Municipal Elections — Hour of Nomination — Councillors Elected by Acclamation—Power of Council of Town to Pass By-law Changing Hour—Construction of Statutes.

Appeal by defendants from order of Master in Chambers (ante 108), setting aside the election of the appellants as councillors for the town of Brampton, and directing a new election upon the ground that the nomination of candidates which resulted in the election of the appellants by acclamation took place at ten o'clock in the forenoon, and not at noon.

T. J. Blain, Brampton, and D. O. Cameron, for appellants.

E. G. Graham, Brampton, for relator.

MEREDITH, C.J.—In each of the years from 1898 to 1902 (inclusive) the municipal council of the town of Brampton provided by by-law that the nomination for councillors should be held at the same time and place as the nomination for mayor, that hour being ten o'clock in the forenoon, and this

they assumed to do under sub-sec. 2 of sec. 118 of the Municipal Act, R. S. O. ch. 223. The difficulty arises in grafting the provisions of the Municipal Amendment Act, 1898, as to the election of councillors of towns having a population of not more than 5,000, upon the provisions of the Municipal Act. Sub-section (1) of the section added by the Act of 1898 (71a) had not the effect of abolishing, in the case of towns to which it applied, their division into wards; the only change made was that, instead of there being a prescribed number of councillors for each ward, the number of councillors was fixed at six, and, instead of being elected by wards, they were all to be elected by a general vote. The language of sub-sec. 2 of the added section should be treated as an inaccurate expression of the idea that, on the conditions and in the event mentioned in it, the former mode of constituting the council and of election of councillors might be restored. Sub-section 2 of sec. 118 should be read, in order to give effect to the amendment, as empowering the council, where the election is to be by general vote, to provide by by-law that the nomination of councillors shall be held at the same time and place as that for mayor, and to make the same provision in the case of all towns of over 5,000, where the nomination of councillors must still be made for the several wards of the town. And sec. 119 should be read as providing that the meeting for the nomination of councillors in either case shall, unless the contrary is provided by by-law, be held at noon. Therefore, the council had power to pass the by-law under the authority of which the nomination for councillors was held at the same time and place as the nomination for mayor, and the appellants were properly nominated and duly elected.

Appeal allowed with costs here and below.

C.A. FEBRUARY 13TH, 1903.

HOLDEN v. TOWNSHIP OF YARMOUTH.

Railway—Negligence of Servants—Crossing—Non-repair of Road—Injury to Persons Crossing Track on Highway—Liability of Railway Company.

Appeals by defendants the corporation of the township of Yarmouth and the Michigan Central Railway Company from the judgment of FALCONBRIDGE, C.J. (1 O. W. R. 557), in favour of plaintiffs as against both defendants for $1,600 damages and costs. The plaintiffs were driving along the Talbot Road in the township of Yarmouth, and, when crossing the railway track, their horse was frightened by the moving of cars, and they were thrown out and injured.

The appeal was heard by Moss, C.J.O., Osler, Maclennan, Garrow, Maclaren, JJ.

A. B. Aylesworth, K.C., for appellant township corporation.

I. F. Hellmuth, K.C., and D. W. Saunders, for appellant railway company.

W. R. Riddell, K.C., for plaintiffs.

Judgment was reserved as to the appeal of the township corporation.

Judgment was given at the close of the argument on the appeal of the railway company.

Moss, C.J.O.—I think we are all agreed that no negligence has been shewn against the railway company. The company was doing its ordinary business in a perfectly legitimate way. In order not to obstruct public travel on the highway, the engine and cars were drawn up to the north of the highway, so as to leave an ample space for the passage of vehicles along the road, and it was a proper act on the part of the railway company to clear the highway in this manner, and then signal the plaintiffs to proceed. That signal was only an invitation in this sense, that it was notice to the plaintiffs that the road was clear, and that they would not be run into by the cars while making the crossing. There was evidence given that there was some noise just as the plaintiffs' vehicle cleared the crossing. If there was such a noise (and if it proceeded from the train) the noise was not an unusual one. I can see no evidence of negligence on the part of the company; their appeal must be allowed, and the action as against them must be dismissed with costs.

Osler, J.A.—The plaintiffs' difficulty is that they have not come up to their pleading. Their pleading is all right—they charge that the company's servants "by negligently moving their cars so frightened the plaintiffs' horse," etc. If the evidence had borne out this allegation, and if they had proved that the defendants had negligently moved their cars, or had done something likely to frighten their horse, they would have been entitled to succeed, but they failed to prove this.

This case is not like Stott v. Grand Trunk R. W. Co., 24 C. P. 347, where there was evidence of a wilful act in blowing the whistle, nor is it like Manchester R. W. Co. v. Fullerton, 14 C. B. N. S., where the company unnecessarily blew off steam from the mud-cocks. In both these cases there was

clearly negligence, but here the plaintiffs have failed to prove any, and as against the railway company their action must be dismissed.

MACLENNAN, J.A.—Unless we are to hold that there is a duty cast upon the railway company, under the circumstances of this case, to preserve absolute silence, there can be no liability for this accident, and I agree that the appeal of the railway company should be allowed.

GARROW and MACLAREN, JJ.A., concurred.

MACMAHON, J. FEBRUARY 14TH, 1903.

WEEKLY COURT.

DAIGNEAU v. DAGENAIS.

Mortgage — Action for Foreclosure — Costs — Mortgagee Claiming more than Amount Due — Tender of Less than Amount Due.

Motion by plaintiff for judgment on further directions and costs after the report of the local Master at Ottawa in an action by a mortgagee of a lot in the village of St. Joseph, in the county of Carleton, for payment or foreclosure and possession. The plaintiff, at the time the action was brought, claimed $400 as being due under the mortgage. The defendant, before action, tendered $152, and paid that sum into Court in full satisfaction of plaintiff's claim. The report of the Master shewed that the amount due plaintiff at the date of the issue of the writ of summons was $229.78, and the amount due at the date of the report was $240.29.

A. E. Lussier, Ottawa, for plaintiff.

T. McVeity, Ottawa, for defendant.

MACMAHON, J., held following Cotterell v. Stratton, L. R. 8 Ch. at p. 302, and Turner v. Hancock, 20 Ch. D. 303, that plaintiff was entitled to his general costs unless he had forfeited them by some improper claim or other misconduct; and, following Loftus v. Swift, 2 Sch. & Lef. 642, Gammon v. Stone, 1 Ves. 339, Goforth v. Bradley, 2 Ves. Sr. 678, and Trotter v. Maclean, 13 Ch. D. 588, that the mere fact that the mortgagee claims more than is due is not such misconduct as will deprive him of costs, and, in the absence of a tender of the whole amount due to him, the mortgagee is entitled to his costs of suit, although he demands more than is due. Therefore plaintiff was entitled to costs.

Judgment for plaintiff with costs, in the usual form.